

(2) (2)
Nos. 86-1553 and 86-1579

Supreme Court, U.S.
FILED

MAY 29 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHESTER COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

MATTHEW IANNIELLO ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED

Solicitor General

WILLIAM F. WELD

Assistant Attorney General

SARA CRISCITELLI

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217

10/70

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions on charges of racketeering and racketeering conspiracy.
2. Whether the district court committed plain error in its charge to the jury.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Holmberg v. Morrisette</i> , 800 F.2d 205 (8th Cir. 1986)	7
<i>Morgan v. Bank of Waukegan</i> , 804 F.2d 970 (7th Cir. 1986)	8
<i>Schreiber Distributing Co. v. Serv-Well Furniture Co.</i> , 806 F.2d 1393 (9th Cir. 1986)	8
<i>Sedima, S.P.R.L. v. Imrex Co.</i> , 473 U.S. 479 (1985)	5, 6, 9, 11, 12
<i>Superior Oil Co. v. Fulmer</i> , 785 F.2d 252 (8th Cir. 1986) .	7, 8
<i>Torwest DBC, Inc. v. Dick</i> , 810 F.2d 925 (10th Cir. 1987)	8
<i>United States v. Frady</i> , 456 U.S. 152 (1982)	11
<i>United States v. Mazzei</i> , 700 F.2d 85 (2d Cir. 1983), cert. denied, 461 U.S. 945 (1983)	10
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	5, 9, 10, 11

Statutes and rules:

18 U.S.C. 152	2
18 U.S.C. 371	2
18 U.S.C. 1341	2
18 U.S.C. 1961(4)	5
18 U.S.C. 1961(5)	5
18 U.S.C. 1962(c)	2, 5
18 U.S.C. 1962(d)	2
18 U.S.C. 3575(e)	6
26 U.S.C. 7201	2
Fed. R. Crim. P.:	
Rule 30	11
Rule 52(b)	11

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1553

CHESTER COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1579

MATTHEW IANNIELLO ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (86-1553 Pet. App. A1-A20) is reported at 808 F.2d 184. The opinion of the district court is reported at 621 F. Supp. 1454.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1986. A petition for rehearing was denied on January 28, 1987. The petitions for a writ of certiorari were filed on March 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were each

convicted of racketeering and racketeering conspiracy, in violation of 18 U.S.C. 1962(c) and (d). In addition to their convictions on the racketeering counts, petitioners were convicted of the following charges: Petitioner Matthew Ianniello was convicted on 35 counts of mail fraud and six counts of tax evasion, in violation of 18 U.S.C. 1341 and 26 U.S.C. 7201. He was sentenced to a total of six years' imprisonment and a \$51,000 fine. Petitioner Benjamin Cohen was convicted on 35 counts of mail fraud, six counts of tax evasion, conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371, and 11 counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was sentenced to five years' imprisonment and was fined \$70,000. Petitioner Alfred Ianniello was convicted on three counts of mail fraud and was sentenced to imprisonment for a year and a day. He was also fined \$16,000. Petitioner Chester Cohen was convicted on two counts of mail fraud. He was sentenced to imprisonment for a year and a day, and he was fined \$12,000. Petitioner Morton Walker, who was also convicted on two counts of mail fraud, was sentenced to two years' imprisonment and a total fine of \$25,000. Petitioner Bernard Kurtz was convicted on 16 counts of mail fraud and 12 counts of bankruptcy fraud. He was sentenced to three years' imprisonment and was fined \$30,000. Petitioner Carl Moskowitz was convicted on 11 counts of mail fraud and was sentenced to two years' imprisonment and fines totalling \$13,000. Petitioner Sol Goldman was convicted on eight counts of mail fraud and 12 counts of bankruptcy fraud. He was sentenced to two years' imprisonment and a \$25,000 fine. Sentences on one or more of the counts against each petitioner were suspended in favor of two years' probation. The court of appeals affirmed (Pet. App. A1-A20).¹

¹ Co-defendant Paul Gelb was also convicted on racketeering, mail fraud, and tax evasion charges, and his conviction was affirmed on

The government's evidence at trial consisted mainly of documentary proof as well as the results of court-ordered electronic surveillance at the offices of petitioners Benjamin Cohen and Matthew Ianniello.² The evidence showed that from 1979 until 1985 petitioners conducted an operation that skimmed millions of dollars in profits from six bars and restaurants that petitioners owned in New York City. Petitioners filed fraudulent tax returns and false applications with the New York State Liquor Authority (SLA). They also skimmed receipts from one business during bankruptcy proceedings. Pet. App. A2-A3.

Petitioners Benjamin Cohen and Matthew Ianniello owned hidden interests in each of the bars and restaurants. They directed the group's skimming operation while hiding their ownership interests in those businesses. Petitioners Chester Cohen and Walker each "fronted" for Benjamin Cohen and Matthew Ianniello in connection with their ownership of one of the bars. Pet. App. A2-A3, A6-A7.

Petitioner Kurtz managed four bars for Benjamin Cohen and Matthew Ianniello. One of the bars was nominally owned by Chester Cohen, Benjamin Cohen's son, and another was nominally owned by Walker.³ Chester Cohen and Walker were responsible for substantial skimming operations. At one point, Chester Cohen was cautioned to reduce his spending because it exceeded

appeal. He has not sought review of his conviction in this Court. "Pet. App." refers to the appendix to the petition in No. 86-1553.

² This factual summary is taken from the opinion of the court of appeals (Pet. App. A2-A7) and from the government's brief in the court of appeals.

³ Walker, the record owner of the "Grapevine," also assisted in raising and laundering money that petitioners used secretly to purchase the "New Peppermint Lounge" (Gov't C.A. Br. 24-26).

his reported income. Both Chester Cohen and Walker lied to SLA investigators concerning, among other matters, the true ownership of the two bars. Pet. App. A5-A7.

In addition to managing bars for Benjamin Cohen and Matthew Ianniello, Kurtz served as the "front" owner of one of the bars, having bought it on their behalf. In the course of his sham ownership of the bar, Kurtz concealed petitioners' ownership, at one point coaching another nominal owner to lie to the SLA. Petitioner Alfred Ianniello shared a hidden interest with his brother Matthew in one of the restaurants, Umberto's Clam House, and he skimmed profits from that business. Pet. App. A4-A6.

Petitioner Moskowitz, an attorney who previously had worked for the SLA, prepared false applications to the SLA on behalf of Benjamin Cohen and Matthew Ianniello. Knowing of their financial interests in the businesses, he nonetheless repeatedly represented in liquor license applications and renewal applications that only the designated nominee owners held interests in the businesses. Petitioner Moskowitz also incorporated a separate business, nominally owned by other persons, that collected door receipts for one of the bars owned by Matthew Ianniello and Benjamin Cohen; the purpose of that business was to receive income that otherwise would have been taxable to the bar. Pet. App. A3-A6.

Petitioner Goldman, an accountant, kept false books and records for the enterprise. He understated the gross receipts of the bars in order to reduce state sales tax payments. He also kept the records for the "Peppermint Lounge," which in 1981 filed a Chapter 11 bankruptcy petition. Goldman's monthly operating reports filed with the bankruptcy court consistently understated the bar's receipts and concealed petitioners' skimming operations. Pet. App. A3.

ARGUMENT

1. Petitioners challenge the court of appeals' construction of the term "pattern of racketeering activity" in the definitional section of the federal racketeering (Racketeer Influenced and Corrupt Organizations Act (RICO)) statute, 18 U.S.C. 1961(5). The RICO statute forbids persons connected with an "enterprise" from participating "in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of unlawful debt" (18 U.S.C. 1962(c)). An enterprise includes any "group of individuals associated in fact although not a legal entity" (18 U.S.C. 1961(4)). Proof of a pattern of racketeering activity "requires at least two acts of racketeering activity," which must occur within ten years of one another (18 U.S.C. 1961(5)).

Petitioners claim that the court of appeals failed to follow this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), where the Court briefly discussed the meaning of the term "pattern of racketeering activity." See 473 U.S. at 496 n.14. They also allege that the court of appeals' analysis is contrary to the analysis of other courts of appeals and that the decision below is inconsistent with this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981).

In *Sedima*, the Court noted that the RICO statute requires proof that the violator conducted an enterprise through a pattern of racketeering activity. *Sedima*, 473 U.S. at 496. The Court then explained (473 U.S. at 496 n.14) that proof of a "pattern of racketeering activity" requires more than just the proof of two isolated criminal acts. Instead, the Court stated, because the statute was not aimed at the "isolated offender," the existence of a "pattern" of racketeering activity requires a showing of "continuity plus relationship" in the commission of the charged predicate acts of racketeering activity (*ibid.*). The Court noted that in defining the term "pattern" in a different provision of the same bill, Congress had said that

“criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” 18 U.S.C. 3575(e). That language, the Court added, could be useful in interpreting the same term in the RICO statute. 473 U.S. at 496 n.14.

Although petitioners argued in the court of appeals that their convictions were contrary to the Court’s analysis in *Sedima*, the court of appeals disagreed. The court found (Pet. App. A11-A13) that, consistent with footnote 14 in *Sedima*, Second Circuit decisions had properly required proof of “relatedness” and “continuity” of criminal conduct in RICO cases. The court of appeals concluded that those features are satisfied “when a person commits at least two acts that have the common purpose of furthering the continuing criminal enterprise with which that person is associated” (Pet. App. A15). The court thus made it clear that the government was required to prove a relationship between the charged acts of racketeering and the affairs of the alleged enterprise that ensured that the RICO statute would not be applied to “isolated” or “sporadic” criminal activity.

a. Petitioner Chester Cohen contends (86-1553 Pet. 20-22) that his involvement in the unlawful enterprise was limited to a single, discrete fraud, and that the evidence against him therefore failed to show a “pattern” of racketeering acts having the requisite relationship and continuity. Chester Cohen participated in the enterprise by serving as the “front” for the undisclosed owners of one of the bars and making false statements to the SLA to conceal the truth regarding the bar’s ownership. Because, in his view, his fraudulent conduct related to only a single scheme, Chester Cohen contends that it would not have constituted a “pattern” of racketeering activity under the

Eighth Circuit's rule, as described in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (1986).

Although petitioner suggests that the Eighth Circuit employs a dramatically different approach from that used by the Second Circuit in applying the "pattern" element, we submit that there is no such sharp divergence in approach and that, in any event, any distinction between the two approaches would not make a difference in this case. The conduct at issue in *Superior Oil* consisted of a single criminal episode, which the plaintiff in that civil RICO action sought to characterize as a "pattern" of racketeering activity by alleging that several components of that single episode were separately chargeable fraudulent acts. See 785 F.2d at 257.⁴ In this case, by contrast, Chester Cohen's fraudulent conduct was not part of a single criminal episode; it consisted of several discrete acts of misrepresentation that occurred over an extended period of time. The evidence showed that Chester Cohen had made fraudulent representations to the SLA in liquor license renewal

⁴ We disagree with petitioners' suggestion that the Eighth Circuit requires that a defendant be shown to have engaged in several *different* fraudulent schemes before the defendant can be said to have engaged in a "pattern" of predicate acts of mail fraud. Repeated, but identical, fraudulent episodes or transactions can constitute a "pattern" of activity, just as repeated identical acts of arson or narcotics distribution can make up a "pattern" of racketeering activity, as long as the conduct consists of more than a single, isolated criminal episode. The limited reach of the Eighth Circuit's decision in *Superior Oil* is demonstrated by that court's characterization of decisions that it regarded as correct because they required "some prolonged course of conduct, not merely an isolated event" (785 F.2d at 255). Moreover, in applying *Superior Oil*, the Eighth Circuit has interpreted that decision to mean that criminal acts do not form a pattern if they are isolated and bounded in time; a pattern can be established, the court implied, if the defendants have "engaged in like activities in the past" (*Holmberg v. Morrisette*, 800 F.2d 205, 210 (8th Cir. 1986)).

applications in five separate calendar years. Those false representations, moreover, directly supported the ongoing criminal aims of the enterprise. Chester Cohen was therefore not engaged in "isolated" or "sporadic" criminal conduct; nor was he involved in only a single criminal episode. His conduct was continuous—occurring over a four-year period—and it was integrally related to the purposes of the enterprise—to permit the bars to be operated by undisclosed principals who could skim large sums of income from the businesses. By any definition, Chester Cohen's racketeering acts therefore would have constituted a "pattern." Compare, *e.g.*, *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987) (activity that is singular and bounded in time does not constitute a "pattern"); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) ("[i]n order to be sufficiently continuous to constitute a pattern * * * the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions"); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986) (fraudulent diversion of a single shipment of goods does not satisfy requirement of "continuity" because it does not exhibit danger of continuing activity).⁵

b. The other petitioners press the alleged conflict between the decision below and the Eighth Circuit's decision in *Superior Oil*, but they have even less basis to claim that

⁵ Petitioner Morton Walker's involvement in the enterprise was similar in nature to Chester Cohen's. Any challenge on his part to the "continuity" of the pattern of racketeering activity would be unsuccessful for the same reason that it is unsuccessful as applied to Chester Cohen. Walker made fraudulent statements in liquor renewal license applications in different years. Thus, although his fraudulent conduct was of the same character each time, the false statements were not all part of the same criminal episode.

the Eighth Circuit's analysis would help them. Each of the other petitioners was involved in a variety of predicate acts of racketeering activity involving a variety of business establishments. They cannot plausibly claim that their many crimes amounted only to one criminal episode and hence lacked continuity. Rather, their argument appears to be not that their crimes were too closely related to support a RICO conviction, but that they were not related closely enough (86-1579 Pet. 11-14). This objection rests on the *relationship* among predicate acts needed for a RICO conviction.

The evidence amply demonstrated a relationship among the predicate acts. The racketeering acts all served the purpose of permitting the enterprise to achieve its ends of skimming profits from and maintaining hidden interests in the bars and restaurants controlled by Matthew Ianniello and Benjamin Cohen. The court of appeals properly found (Pet. App. A11-A12) that the evidence established a direct relationship between the predicate acts, since the acts were all directed at achieving the specified goals of the enterprise. There is no suggestion in *Sedima* or any court of appeals decision after *Sedima* that the requirement of a relationship among the predicate acts calls for more than that the predicate acts were all performed for the purpose of furthering specific enterprise objectives.

c. The court of appeals in this case found that, under its precedents, proof of an enterprise requires proof of an ongoing scheme (Pet. App. A13). Petitioner Chester Cohen argues (86-1553 Pet. 17-20) that in this decision and others the Second Circuit has obliterated the distinction between enterprise and pattern, in violation of this Court's discussion in *Turkette* and in conflict with decisions from the other circuits. That is not so.

By noting that proof of the existence of the enterprise requires proof of continuing illegal activity—at least where the enterprise is a group of persons associated for

criminal purposes—the court of appeals was acknowledging a point that this Court made in *Turkette*, i.e., that the enterprise and pattern elements of RICO are distinct elements, and that proof of an enterprise requires proof of “an ongoing organization, formal or informal, and [proof that] the various associates function as a continuing unit” (*United States v. Turkette*, 452 U.S. at 583). Moreover, one of the leading Second Circuit cases on the subject demonstrates clearly that court’s appreciation of the distinction between the “pattern” and “enterprise” elements of the RICO statute. In *United States v. Mazzei*, 700 F.2d 85 (2d Cir. 1983), cert denied, 461 U.S. 945 (1983), RICO counts were brought against a group that conducted a point-shaving operation during the 1978-79 Boston College basketball season. The Second Circuit agreed that “*Turkette* requires the government to prove both the existence of an ‘enterprise’ and a ‘pattern of racketeering activity’ ” (*id.* at 89). The court then explained that in *Mazzei* a group of individuals had worked together as a continuing unit with the common purpose of profiting from point shaving (*ibid.*). As the *Turkette* Court acknowledged could happen (452 U.S. at 583), the proof of the enterprise overlapped with the proof of the pattern, since the purpose of the ongoing structure—the enterprise—was to engage in the illegal activities—the pattern. Much the same thing happened in this case, but the fact that the proof of the two elements overlaps does not mean that the statute no longer requires both elements to be proved.

The overlap in proof is a natural result of *Turkette*’s holding that an illegal operation can be an enterprise under RICO. In this case, the government presented detailed evidence concerning an ongoing course of conduct by petitioners. That evidence demonstrated continuity of personnel and an organizational structure devoted to skimming. At the same time, the proof at trial exhibited the illegal activities that constituted the pattern of racketeering. Where an organization is set up for a

criminal purpose and engages in crime as its routine conduct, *Turkette* recognized (452 U.S. at 583) that the same set of facts often will show the existence of the enterprise and the pattern of racketeering through which it is conducted. None of the court of appeals cases petitioner cites suggests that the same evidence may not be used to prove both enterprise and pattern. Petitioner is therefore incorrect in claiming the existence of a conflict with *Turkette* and decisions of other courts of appeals.

2. Petitioners also claim that the district court's instructions to the jury on the RICO counts were erroneous, as they did not incorporate the principles set forth in footnote 14 of *Sedima*.

As an initial matter, petitioners did not preserve their claim in the district court. Other than to cite the *Sedima* case to the district court, petitioners did not submit a requested charge or object specifically to any portion of the instruction at trial (Tr. 2226-2227). Consequently, they would be entitled to relief only if the alleged error in the charge was plain error, *i.e.*, if it was "particularly egregious" and constituted a "miscarriage of justice." *United States v. Frady*, 456 U.S. 152, 163 (1982); Fed. R. Crim. P. 30, 52(b).

Petitioners contend that the instructions on "pattern of racketeering activity" failed to focus the jury's attention on the need for continuity and relationship in petitioners' criminal behavior. Viewed as a whole, however, the district court's instructions properly conveyed the requirements of the statute. First, the instructions focused intensively on all the elements of a RICO conspiracy and substantive offense, including the requirements of continuity and relatedness in finding the existence of an enterprise (Tr. 3038-3039). The court then examined the requirement for RICO conspiracy that a defendant "personally conspire to commit at least two racketeering acts in the course of the activities of the enterprise" (Tr. 3043).

The court specifically defined "pattern of racketeering activity" to require a finding of "two or more acts in violation of federal criminal laws undertaken *in aid of the affairs of the enterprise*" (Tr. 3036-3037 (emphasis added)). Similarly, the court instructed that the government must prove "either that [the defendant's] acts were in some way related to the affairs of the enterprise, or that he was able to commit the acts solely by virtue of his position or involvement in the affairs of the enterprise" (Tr. 3061).

These instructions fairly presented the requirements of the statute to the jury, and certainly cannot be considered "plain error." From these instructions, the jury must have understood that the defendants' criminal acts had to be related to one another and that the defendants' course of criminal conduct had to extend over an appreciable period of time before the defendants could be convicted under RICO. If the principles given to the jury in the district court's instructions were different from the principles discussed by this Court in *Sedima*, the difference was, as the court of appeals suggested, "one of form and not of substance" (Pet. App. A11).

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

MAY 1987

